[2019] UKFTT 0241 (TC)

TC07087

Appeal number: TC/2017/07576

INCOME TAX – closure notices and discovery assessments - whether assessments valid "best judgement" assessments - whether taxpayer proved he was overcharged by the assessments

FIRST-TIER TRIBUNAL
TAX CHAMBER

ARMOOGUM VADAMALAY **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE MARILYN MCKEEVER
MRS CAROLINE DE ALBUQUERQUE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 3 December 2018

Mr Jon Vyse, accountant, for the Appellant

Mr Christopher Vellis, Officer of the Respondents, for the Respondents

DECISION

Introduction

1. Mr Armoogum Vadamalay appeals against discovery assessments made under section 29 of the Taxes Management Act 1970 (TMA) for the tax years 2011/12 and 2012/13 and against closure notices under section 28A TMA for the tax years 2013/14 and 2014/15 all in respect of income tax on undeclared rental income. The closure notice for the tax year 2013/14 also assessed capital gains tax in respect of the disposal of one of his two rental properties.

2. All the assessments were issued on 15 June 2017 and the respective amounts assessed are:

   (1) 2011/12: £5,286.40

   (2) 2012/13: £5,815.00

   (3) 2013/14: £21,470.00 being the additional tax due by reference to rental income of £29,000 and a capital gain of £58,700.

   (4) 2014/15: £3,218.00

3. At the hearing we had before us bundles of documents and we heard witness evidence from Mr Vadamalay and from Mr Pither, the HMRC Officer who dealt with the enquiries into Mr Vadamalay's tax returns and made the assessments.

4. At the conclusion of the hearing we were not satisfied that the assessments were "best judgement" assessments and issued directions to the parties to provide written submissions on the matter. HMRC applied to have those directions set aside and requested full reasons for our response. We provided those reasons and issued further directions, clarifying the issues and requesting the parties to provide further written submissions which we have now received. The matters raised are discussed in the body of this decision which we make having taken account of the written and oral submissions at the hearing and the written submissions received in response to the directions after the hearing.

The Law

5. Section 28A TMA so far as relevant provides as follows:

> ***"[28A Completion of enquiry into personal …***
> [[(1) This section applies in relation to an enquiry under section 9A(1) *or 12ZM* of this Act.
> (1A) …
> (1B) The enquiry is completed when an officer of Revenue and Customs informs the taxpayer by notice (a "final closure notice")—
> (a) in a case where no partial closure notice has been given, that the officer has completed his enquiries, …
> (2) A [partial or final closure notice] must [state the officer's conclusions and]—
> (a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions.
(3) A [partial or final closure notice] takes effect when it is issued.
…
[(7) In this section "the taxpayer" means the person to whom notice of enquiry was given."

6. HMRC opened an in time enquiry under section 9A TMA in relation to the Appellant's 2013/14 tax return on 9 September 2015 and into his 2014/15 tax return on 11 April 2016. These enquiries resulted in the closure notices set out in paragraph 2 (3) and (4) above.

7. Section 29 TMA, so far as material provides:

"[29 Assessment where loss of tax discovered]
[(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
…
the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
(2) Where—
(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and
…
(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
(a) in respect of the year of assessment mentioned in that subsection; and
(b) . . .in the same capacity as that in which he made and delivered the return, unless one of the two conditions mentioned below is fulfilled.
(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
(5) The second condition is that at the time when an officer of the Board—
(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
[(b) in a case where a notice of enquiry into the return was given—
(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or
(ii) if no such partial closure notice was issued, issued a final closure notice,]
the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.
…
(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.
…

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.
(9) Any reference in this section to the relevant year of assessment is a reference to—
(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and
(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made."

8. HMRC submit that they "discovered" that the Appellant was receiving undeclared rental income in 2013/14 and that he had made undeclared capital gains in the same year. They further discovered that the Appellant had not declared rental income for the year 2011/12. The Appellant did not file a tax return for the year 2011/12 and he omitted the rent from his tax return for 2012/13. HMRC submit that the Appellant was, at the least, "careless" so that they were entitled to raise a discovery assessment and did so within the time limits laid down in section 36 TMA. These enquiries led to the issue of the discovery assessments mentioned in paragraph 2(1) and (2) above.

9. It is unclear whether the appeal, which was dated 11 October 2017 was in time, but HMRC has not objected to the case proceeding, and to the extent necessary, we give permission to appeal out of time.

10. The main ground of the Appellant's appeal is that HMRC's assessments are unfair and that they overstate the rent received.

11. The notice of appeal and the Appellant's skeleton argument also referred to various matters concerning a Subject Access Request under the Data Protection Act 1998 (which was the relevant statute at the time). To the extent that these are intended to be grounds of appeal against the assessments, we observe that this Tribunal has no jurisdiction in data protection matters and we do not consider them further.

12. The Tribunal's powers on an appeal are set out in section 50 TMA, which provides, so far as relevant:

"50 Procedure
(1)–(5) . . .
[(6) If, on an appeal notified to the tribunal, the tribunal decides—
(a) that, . . ., the appellant is overcharged by a self-assessment;
(b) that, . . ., any amounts contained in a partnership statement are excessive; or
(c) that the appellant is overcharged by an assessment other than a self-assessment,
the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good."

Burden of proof

13. In relation to the discovery assessments, it is for HMRC to show that they have made a discovery and that the taxpayer was careless.

14. It is for the Appellant to prove that he is overcharged by the assessments

15. In each case, the standard of proof is the normal civil standard, on the balance of probabilities.

The facts

16. Mr Vadamalay sold a property, 63 Maybank Avenue, Wembley ("Maybank Avenue") on 25 February 2014 for £300,000. HMRC identified the sale as a tax risk and on making investigations established that Maybank Avenue had never been Mr Vadamalay's residence and so could not be eligible for main residence relief from capital gains tax. As a result of this discovery, Mr Pither opened an enquiry into Mr Vadamalay's tax return for 2013/14 on 9 September 2015,, initially looking at capital gains tax. At that time, the Appellant was represented by a different accountant.

17. Neither the Appellant nor his then accountant (to whom the letter was copied) responded. HMRC issued a formal information notice under schedule 36 Finance Act 2008 ("schedule 36 notice") on 20 October 2015. The Appellant still did not respond and HMRC sent penalty notices for non-compliance. On receipt of the second penalty notice, Mr Vadamalay telephoned HMRC (on 17 February 2016) and said that his circumstances precluded him from dealing with the matter properly. Mr Pither suggested he appoint an agent and told him he needed to provide the information.

18. Mr Vadamalay did not provide any information and HMRC sent a further penalty notice.

19. On 11 April 2016 enquiries were opened into Mr Vadamalay's tax position for the tax years from 2004/5 to 2012/13 and for 2014/15, although the enquiries for years up to 2010/11 were not in issue at the hearing. The enquiries were wide ranging, looking at Mr Vadamalay's income position generally. In particular HMRC had obtained information that Mr Vadamalay had a property business and had failed to declare the rental income. The accompanying schedule of information requested asked for details of tenants, rent agreements, copy bank accounts showing rent receipts and expense payments and so on. The agent was also copied. HMRC received no response and issued further schedule 36 notices on 31 May 2016. The Appellant failed to provide the information.

20. On 3 November 2016, Mr Pither wrote a "view of the matter" letter to Mr Vadamalay stating:

> "We have reached the point wherein I am needing to make a best judgement assessment as to the amount of tax that you have failed to declare to HMRC. In addition I also need decide (sic) as to what extent you have made yourself liable to a penalty or penalties."

21. The Appellant had failed to notify his liability to tax for years up to 5 April 2009 and so had not been sent a tax return. From 2009/10 to 2011/12 he was sent returns but failed to complete them. After that he submitted returns but failed to mention his property business or the disposal of Maybank Avenue.

22. Mr Pither calculated the gain on Maybank Avenue by taking the Land Registry figures for the acquisition and disposal prices and in the absence of any information from the Appellant, allowing 2% for allowable acquisition and disposal costs.

23. In relation to the rent on Maybank Avenue and a further rental property, 409 Whitehorse Road, Thornton Heath ("Whitehorse Road"), Mr Pither took an estimated market rent and worked backwards, assuming a 10% increase in rent each year. He made no allowance for interest costs, although the Land Register for each property showed a charge, dated the same day as each acquisition, which strongly suggested that interest was paid in the course of the property business and was allowable. Nor did he allow any deduction for expenses. Mr Pither's evidence showed that he was aware of the mortgages.

24. HMRC's Statement of Case indicates that the Appellant's agent wrote to HMRC in February 2017 to request more time to provide information, which extension was granted. That correspondence was not in our bundles and it is unclear which agent was concerned at that stage. In any event, it does not seem that any information was in fact provided.

25. The various assessments were, as noted above, issued on 15 June 2017.

26. Around this time, Mr Vadamalay appointed Mr Vyse to represent him. At the hearing, Mr Vadamalay stated that he had fallen out with his previous accountant. He had not paid his bills and the accountant would not do any further work for him. He had previously relied on his accountant to deal with his tax affairs.

27. Instead of providing the information which HMRC had been asking for, or providing figures to show the actual rental receipts and expenses, on 3 August 2017 Mr Vyse made a subject access request under the Data Protection Act 1998 requesting copies of the data held by HMRC about the mortgages on Maybank Avenue and Whitehorse Road, the interest payable on them and SDLT forms relating to them. The subsequent correspondence seems to suggest that Mr Vyse expected HMRC to investigate the interest and expenses which Mr Vadamalay might have paid and to come up with the correct figure for the net rent. We return to this in the discussion below.

28. We were also provided with evidence, at the hearing and in response to the first directions that Mr Vadamalay had encountered a series of difficulties in his personal and business lives which, it was alleged, had prevented him from dealing with his tax affairs in a timely manner. Mr Vyse seemed to be arguing that these circumstances constituted a "reasonable excuse". Even if that were the case (and we express no opinion on the matter) reasonable excuse is irrelevant in the context of the present proceedings. The questions we have to determine are whether HMRC made valid assessments and whether Mr Vadamalay has shown he was overcharged by those assessments.

29. In an undated "Statement of Case" for the Appellant which, from the correspondence attached, must have been produced in or after February 2018 ,

Mr Vyse seeks also to challenge the validity of the schedule 36 notices and the associated penalties. Those matters are not the subject of the present appeal and we do not consider them further.

Discussion

30. The Appellant's main ground of appeal appears to be that the assessments were not "fair" and he quotes a passage from the case of *Johnson v Scott (Inspector of Taxes)* 52 TC 383 which is referred to in HMRC's compliance handbook:

> "When, in para 7(b) of the Case Stated, the Commissioners state that (with certain exceptions) the Inspector's figures were 'fair", that is, in my judgment, precisely and exactly what they ought to be - fair. The fact that the onus is on the taxpayer to displace the assessment is not intended to give the Crown carte blanche to make wild or extravagant claims. Where an inference, of whatever nature, falls to be made, one invariably speaks of a "fair" inference. Where, as is the case in this matter, figures have to be inferred, what has to be made is a "fair" inference as to what such figures may have been. The figures themselves must be fair."

31. Mr Vyse did not also quote the passage immediately before that extract, which also appears in the compliance handbook:

> "Indeed, it is quite impossible to see how the Crown, in cases of this kind, could do anything else but attempt to draw inferences. The true facts are known, presumably, if known at all, to one person only - the Appellant himself. If once it is clear that he has not put before the tax authorities the full amount of his income, as on the quite clear inferences of fact to be made in the present case he has not, what can then be done? Of course all estimates are unsatisfactory; of course they will always be open to challenge in points of detail; and of course they may well be under-estimates rather than over-estimates as well. But what the Crown has to do in such a situation is, on the known facts, to make reasonable inferences."

32. These extracts are from the High Court judgement. The case went to the court of Appeal which found for HMRC on the basis that "(1) once the Crown had discharged the onus of establishing the taxpayer's neglect, the onus of displacing the assessment shifted to the taxpayer; (2) there was sufficient evidence upon which the Commissioners could reach their conclusion that there had been neglect by the taxpayer in respect of each of the years of assessment; (3) the taxpayer being the only person who knew the true facts had not rebutted the reasonable inferences which the Revenue had properly drawn from the known facts in order to arrive at fair figures for the purpose of raising the assessments"

33. In other words, whilst HMRC's assessments must be based on reasonable inferences, it is up to the taxpayer, who is the only person who knows all the facts, to rebut the figures estimated by HMRC.

34. Mr Vyse, in his correspondence, in making the subject access request and in his submissions at the hearing seemed to think it was up to HMRC to dig out the information about Mr Vadamalay's expenditure and work out what the right amount of net rent was.

35. That is not the way the system works. As with the previous legislation which was in issue in *Johnson v Scott*, the onus is on HMRC to show that they have made a discovery (in relation to the section 29 TMA assessments) and that the taxpayer has been careless or deliberate. When issuing a closure notice under section 28A TMA HMRC must set out what they consider to be the tax due. The burden then passes to the taxpayer to show both that the assessments are incorrect and what the correct amounts should be.

36. Neither Mr Vadamalay nor either of his accountants provided any information at all about the property business and the Appellant's expenditure on it at any time up to and including the hearing. Mr Vyse's arguments revolved around average property management costs rather than focussing on the actual costs incurred by Mr Vadamalay.

37. We are satisfied that HMRC made "discoveries" in that they found out that Mr Vadamalay had been carrying on a property business and had not declared the rent. Also that he had sold Maybank Avenue and not declared the capital gain.

38. Mr Vadamalay gave evidence that he was aware of his obligation to tell HMRC that he was receiving rent but he left it all to his accountant. It was unclear whether he had actually given his accountant the relevant information. He asserted that he had not made any profit because he had had problems with his tenants and a fraudulent management company. He also asserted that he was unaware that he had to provide HMRC with information about the business, despite the schedule 36 notices and notices of the penalties for non-compliance, which he had received, as indicated by the telephone call to Mr Pither on 17 February 2016. In cross-examination Mr Vadamalay said that he did not check the work his accountant did or the tax returns he prepared. He simply assumed that as the accountant did the books for the business and charged him for the work they must be correct. The most cursory check of the tax returns (for the years they were submitted) would have indicated that taxable income and gains had been omitted. Mr Vadamalay was an experienced businessman. He was aware of his tax obligations. If the business was making losses, one would have expected him to want to claim them.

39. Taking all the evidence into account, we are satisfied that Mr Vadamalay's behaviour in omitting income and gains from his tax return and in failing to notify HMRC of his liability in the first place was, at the very least, "careless".

40. The conditions for making a discovery assessment were therefore satisfied.

41. However, we were not satisfied that the assessments were valid "best judgement" assessments. The expression "best judgement" does not appear in section 28A or section 29 TMA; it is borrowed from the Value Added Tax Act 1994.

42. Section 28A TMA provides:

> "(2) A [partial or final closure notice][4] must [state the officer's conclusions and][5] –
> (a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions."

43. Section 29 TMA provides:

> **"29.— Assessment where loss of tax discovered.**
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a [year of assessment][2] —
> (a) that any [income …[4] which ought to have been assessed to income tax,…[3] have not been assessed, or
> (b) that an assessment to tax is or has become insufficient, or
> (c) …
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought **in his or their opinion** to be charged **in order to make good to the Crown the loss of tax.**" (emphasis added)

44. Both these provisions require the officer of HMRC to form an opinion as to the correct amount of tax which should be charged. Section 29 expressly states that the opinion has to be formed about the amount of tax which needs to be charged in order to make good the loss of tax. It is implicit in section 28A that the amendments which the officer is entitled to make to the return are those which in his opinion result in the right amount of tax being charged.

45. HMRC can use sections 28A and 29 TMA to ensure that the taxpayer pays what, in their opinion, is the correct amount of tax. Where the taxpayer has failed to provide information it is inevitable that this will involve a degree of guesswork and is likely to be inaccurate, but it does not give HMRC carte blanche to pull any figure it likes out of the air. The conclusion must be reached by a genuine exercise of judgement taking account of the known facts and making reasonable inferences from them. In HMRC's "view of the matter" letter to the Appellant dated 3 November 2016, Mr Pither himself stated

> "We have reached the point where I am needing to make a **best judgement** assessment as to the amount of tax you have failed to declare to HMRC…." (emphasis added)

46. In our view, the first question to be addressed is whether the assessments which were subsequently made were indeed "best judgement" assessments in the sense that they were reached by a genuine exercise of judgement.

47. The leading case on this is *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290. Having observed that the taxpayer has the obligation to make his return, that he is the person with the information to make it, and HMRC are not required to carry out exhaustive investigations themselves to determine what the tax should be, Woolf J quoted from the Privy Council case of *Comr of Income Tax, United and Central Provinces v Badridas Ramrai Shop* (1937) 64 LR Ind App 102. That passage includes the classic statement of what constitutes a best judgement assessment:

> "The officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously, because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment,

and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate: and though there must necessarily be guesswork in the matter, it must be honest guesswork."

48. The Court of Appeal considered *Van Boeckel* and reviewed other authorities in *Pegasus Birds Ltd v Commissioners of HM Customs and Excise* [2004] EWCA Civ 1015. Carnwath LJ said:

> "16.. In *Rahman v Customs & Excise Commissioners [1998] STC 826* , I drew attention to phrases used by Woolf J in the leading case under this Act (*Van Boeckel v Customs & Excise Commissioners [1981] STC 290*) and in previous authorities in other tax contexts, to explain the effect of the "best of their judgment" requirement:
>
> > "The passages I have underlined show that the Tribunal should not treat an assessment as invalid merely because they disagree as to how the judgment should have been exercised. A much stronger finding is required: for example, that the assessment has been reached 'dishonestly or vindictively or capriciously'; or is a 'spurious estimate or guess in which all elements of judgment are missing'; or is 'wholly unreasonable'. … Short of such a finding, there is no justification for setting aside the assessment." (p 835)"

49. In *Rahman (No 2)* [2003] STC 150, Chadwick LJ made it clear that it was not open to the Tribunal to find that an assessment was not to best judgement simply because the Tribunal's own judgement produced a different amount. He went on to say that:

> "the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case the proper inference may be that the assessment was indeed arbitrary ."

50. We now turn to the present case. It has to be said that Mr Vadamaly has not been co-operative. As set out above, HMRC issued more than one schedule 36 notice and issued penalties for non-compliance yet Mr Vadamaly still did not provide the required information. He has had many opportunities to provide evidence to HMRC as to the correct amount of the rent and his expenses and the amount of the tax due. At the hearing, Mr Vyse, somewhat inexplicably, chose to present information about average property business expenses he had encountered in his practice rather than the actual expenses incurred by his client in this case. As also noted, he seemed to expect HMRC to carry out research to determine what the rent was and what the expenses and mortgage interest should have been. As explained in *Van Boeckel*, that is not HMRC's job, but that does not absolve HMRC of the obligation to make a fair assessment to the best of their judgement.

51. In calculating the amount of tax due HMRC started from amounts said to be the then current market rent for each property although it was not clear how they had arrived at those figures. They then assumed that rents had risen at 10% a year. They did not allow any deduction for mortgage interest, although they were aware that both Maybank Avenue and Whitehorse Road were mortgaged and the Land

Registers of both properties showed that the charges were entered into on the same dates as the properties were purchased, which strongly suggests the loans were used to buy the properties. HMRC had not reduced their assumed rent to allow for *any* expenses. In other words, their assessments were made on the basis that the rent received was pure profit and that the business had no expenses at all. This is simply unrealistic, especially in the light of the mortgages and, in our view, wholly unreasonable.

52. We do not accuse HMRC of acting "dishonestly or vindictively" but we are of the view that the assessments can be said to be a "'spurious estimate or guess in which all elements of judgment are missing'; or … 'wholly unreasonable'". No business has no expenses and to make an assessment on the basis that there are no expenses does not, in our view, satisfy the test laid down in *Van Boeckel* that the officer

> "must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, … though there must necessarily be guesswork in the matter, it must be honest guess-work."

53. We accordingly found that the assessments which are the subject of the appeal were not proper best judgement assessments.

54. The next question is as to the consequences of that finding. Strictly, it would appear that the assessments should be set aside. However, guidance on an alternative approach is to be found in *Pegasus Birds*. The Court reminded the Tribunal that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden being on the taxpayer. Lord Carnwath said:

> "Even if the process of assessment is found defective in some respect applying the *Rahman (2)* test, the question remains whether the defect is so serious or fundamental that justice requires the whole assessment to be set aside, or whether justice can be done simply by correcting the amount to what the Tribunal finds to be a fair figure on the evidence before it. In the latter case, the Tribunal is not required to treat the assessment as a nullity, but should amend it accordingly."

55. Mr Vadamaly failed to notify HMRC of his liability to tax, he failed to complete tax returns when required to do so, he failed to declare the income of his property business and the sale of one of the properties and he failed to co-operate with HMRC when they found out about it. He clearly owes tax and he should pay it. We do not consider it to be in the interests of justice for the assessments to be set aside. Having said that, the defects in the making of the assessments are such that we required further assistance to determine a fair figure for the tax to be paid. We therefore issued the further directions on 20 February 2019 requiring HMRC to reconsider the quantum of the assessments and allowing the Appellant to make further submissions in response and provide evidence as to the actual amount of the expenses.

56. The Appellant had provided evidence of the mortgage interest paid in response to the first set of directions which we issued. In response to the 20 February 2019 directions, HMRC revised the quantum of the closure notices and discovery

assessments to reduce the amounts of the estimated rent by the amount of the documented mortgage interest.

57. We are satisfied that these revised figures represent a proper exercise of judgement. They remain, no doubt, inaccurate, but that does not matter. Inaccuracy is inherent in the "best judgement" process and there is ample authority that it is now up to the taxpayer to show what the correct figures are. For example, in *Bi-Flex Caribbean Ltd v IRC* (1990) 63 TC 515 ("Bi-Flex Caribbean"), Lord Lowry referred, with approval, to the following passage from *N Ltd v Commission of Taxes* (1962) 24 SATC 655 (a decision of the High Court of Nyasaland) at [658] (emphasis added):

58. "**The onus is upon the appellant, by satisfactory evidence, to show that the assessment ought to be reduced or set aside**, that is, the appellant has to attain the standard of proof in a civil suit to prove his case. When the evidence of the appellant and his books are satisfactory, which is an identical standard of proof, the burden of proof is shifted from the appellant to the Commissioner. The circumstances that the facts are peculiarly within the knowledge of one party is a relevant matter in considering the sufficiency of evidence to discharge a burden of proof. Obviously, the facts in relation to his income are facts peculiarly within the knowledge of the taxpayer or, in a company, of its agents. In the absence of some record in the mind or in the books of the taxpayer, **it would more often than not be quite impossible to make a correct assessment. The assessment would necessarily be a guess to a more or less extent and almost certainly inaccurate in fact...[An assessment] is prima facie right and remains right until the appellant shows it is wrong. The taxpayer must as a general rule, show not only negatively that the assessment is wrong but also, positively, what correction should be made to make it right or more nearly right.**"

59. In *Norman v Golder* (1944) 26 TC 293, Lord Greene MR considered that a "best judgment" assessment stands unless and until the taxpayer satisfies the Commissioners (now the First-tier Tribunal) that the assessment is wrong.

60. The Appellant produced further documents and submissions in response to HMRC's revised figures.

61. No submissions or evidence were provided in relation to the computation of the capital gain on the sale of Maybank Avenue.

62. Mr Vyse submitted that the rental figures for both properties were too high. He provided a copy of an unsigned lease agreement for Maybank Avenue which showed rent of £1,100 a month. He asserted that there were arrears of rent and produced an unsigned copy of a letter before action which stated that the outstanding rent was £2,200. In relation to Whitehorse Road, Mr Vyse produced a copy of a signed notice seeking possession of a property under the Housing Act 1988 dated 9 February 2015. The notice stated that the rent was £1,200 a month and that, at the date of the notice, arrears of rent amounted to £15,452.37. A rent arrears schedule was attached to the notice which showed the due dates for payment of rent, the amounts due, the amounts actually paid and the accumulated

arrears up to 12 January 2015. The schedule showed that no rent had been paid after October 2014. He also provided a copy of an order of the Croydon County Court dated 22 April 2015 ordering the tenants to give the Appellant possession of Whitehorse Road and to pay rent arrears of £19,158.62 and costs of £250.

63. Mr Vyse claimed to reduce the assessments by the amount of the bad debts and the costs.

64. Mr Vyse further claimed that the Appellant was entitled to a wear and tear allowance of 10% of the "relevant rental amount" under section 308C of the Income (Trading and Other Income) Act 2005 ("ITTOIA"). The wear and tear allowance may be made where the taxpayer makes a furnished letting and it permits a standard deduction to be made from the rent instead of the taxpayer deducting the actual expenses.

65. Finally, he submitted that the assessments should take account of the Appellant's personal tax allowance.

Conclusions

66. No evidence has been presented about the amount of capital gains tax due and, accordingly, the capital gains tax assessment stands good.

67. The documents produced in relation to Maybank Avenue are not sufficient to establish, on the balance of probabilities, the actual amount of the rent payable or paid on that property. Accordingly, HMRC's estimated figures must stand.

68. Section 308C of ITTOIA sets out the *consequences* of the wear and tear allowance. Section 308A of ITTOIA provides for the allowance and requires that the taxpayer must make an election on or before the first anniversary of the normal self-assessment filing date for the relevant year in order to obtain it. We had no evidence that such an election had been made and given that Mr Vadamalay did not declare his property income it is inherently unlikely that he did make it. There should be no deduction for the wear and tear allowance and as Mr Vadamalay has provided no evidence of actual expenses, no deduction in respect of expenses can be allowed.

69. The Appellant accepts HMRC's deductions for the mortgage interest and those deductions should be made.

70. We have no evidence of the Appellant's other income for the relevant years or that his personal allowance is available for any of them. Accordingly no adjustment should be made for the personal allowance.

71. We consider that the notice seeking possession of Whitehorse Road, together with with the schedule of arrears and the copy Court Order do constitute evidence of the rent charged and the amount received in respect of that property. Accordingly the assessments in relation to Whitehorse Road should be adjusted to take into

account the actual amount of rent received in each of the relevant years as set out in the rent arrears schedule.

72. We note that the Court ordered the tenant to pay the arrears and costs, and if the Appellant received some or all of these amounts in later tax years they would be taxable when received.

73. In accordance with section 50(6)(c) TMA we have decided that the Appellant has been overcharged by the closure notices and discovery assessments to the extent set out above and that the assessments should be reduced accordingly.

74. HMRC shall therefore recalculate the amount of tax and interest owing on the basis of the following adjustments to their original calculations:

    (1) The rental income received in respect of Whitehorse Road shall be amended for each tax year to the amounts shown as received in the schedule of arrears attached to the notice seeking possession dated 9 February 2015.

    (2) The agreed amounts of mortgage interest paid shall be allowed as a deduction from the rent in each of the relevant years.

75. No further amendments shall be made to the original amounts of the assessments.

Decision

76. For the reasons set out above, we allow the appeal in part, to the extent set out in paragraph 74 above.

77. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 11 APRIL 2019